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No. 83-2097

In the Supreme Court of the United States

October Term, 1984

BURGER KING CORPORATION,
a Florida corporation,
Appellant,

vs.

JOHN RUDZEWICZ,
Appellee.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS, ELEVENTH CIRCUIT

BRIEF IN OPPOSITION TO MOTION TO AFFIRM JUDGMENT

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QUESTION PRESENTED FOR REVIEW

WHETHER THE CIRCUIT COURT ERRED IN HOLDING UNCONSTITUTIONAL, AS VIOLATIVE OF THE FOURTEENTH AMENDMENT DUE-PROCESS CLAUSE, SECTION 48.193(1)(g) OF THE FLORIDA STATUTES, WHICH CONFERS LONG-ARM JURISDICTION UPON ONE WHO BREACHES A CONTRACT IN FLORIDA BY FAILING TO PERFORM ACTS REQUIRED BY THE CONTRACT TO BE PERFORMED IN FLORIDA.

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RESPONSE TO MOTION TO AFFIRM JUDGMENT

Appellant Burger King Corporation[1] respectfully offers the following response to the appellee's Motion to Affirm Judgment. Because that motion ignores almost all of the arguments and authorities offered in our Jurisdictional Statement, we will rely primarily upon that statement, and not reassert unrebutted points. We do wish to make the following points in specific reaction to the appellee's motion:

1. The appellee (hereinafter "Mr. Rudzewicz") has effectively conceded that this Court has jurisdiction by direct appeal under 28 U.S.C. §1254(2). As the circuit

1. Burger King Corporation is a wholly-owned subsidiary of the Pillsbury Company, with no subsidiaries or affiliates.

court noted in its opinion, Mr. Rudzewicz conceded at trial that his activities in this case "fall within the reach of the Florida long-arm statute, Fla. Stat. §48.193(1)(g)" (A7).[2] Likewise in his motion (p. 2), Mr. Rudzewicz acknowledges that "the facts presented satisfy the requirements of the Florida long-arm statute . . . ."[3] In this context, Mr. Rudzewicz argues (motion at 3) that "[t]he 11th Circuit was testing the *application* of [the statute] . . ."; and "the *application* of the statute to this defendant, under these particular circumstances, was unconstitutional" (emphasis in original). That is a correct statement of the circuit court's holding; as we note in our Jurisdictional Statement (p. 11), §1254(2) creates a right of direct appeal of any decision holding a state statute to be repugnant to the Constitution, whether the statute is declared invalid on its face, or as applied.[4] We agree entirely with Mr. Rudzewicz' statement of the circuit court's holding (motion at 16-17): "By application—not by construction—the Florida statute cannot be constitutionally applied to Rudzewicz by the federal district court in Florida." Both parties now agree that the trial court declared the statute unconstitutional as applied.

2. These concessions notwithstanding, Mr. Rudzewicz suggests (motion at 24-25) that the statute should be construed to include an implicit constitutional qualifier. We address this point at pages 8-11 of our Jurisdictional Statement, acknowledging that there are a handful of Florida

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2. "A" refers to the Appendix to Burger King's Jurisdictional Statement.

3. Later in his motion (p. 16), Mr. Rudzewicz says: "Here, Defendant Rudzewicz may well have met the literal requirements of the Florida long-arm statute . . . ."

4. *New Orleans v. Dukes*, 427 U.S. 297, 301-02 (1976) (per curiam); *Dutton v. Evans*, 400 U.S. 74, 76 n.6 (1970) (separate opinion announcing judgment). See also the other cases cited in footnote 16, p. 11, of our Jurisdictional Statement.

decisions which agree. In light of the statute's plain language, however, the clear majority of Florida decisions construes this statute to mean exactly what it says—that long-arm jurisdiction is conferred *whenever* a non-resident fails "to perform acts required by the contract to be performed in this state." Thus we cited four Florida decisions expressly holding that the failure to pay money due in Florida is enough to confer jurisdiction under the statute, and another four which enforce the statute under identical circumstances. Jurisdictional Statement at 10-11 nn.12-14. As the court said in *Engineered Storage Systems, Inc. v. National Partitions & Interiors, Inc.*, 415 So.2d 114, 115 n.3 (Fla. 3rd DCA 1982): "A reading of the statute to require the doing of more than one of the enumerated acts, even for the limited purpose of avoiding a perceived constitutional problem, would be strained." The court continued: "The statute plainly states that by doing any one of the acts enumerated, a non-resident person submits to the jurisdiction of the courts of this state for a cause of action arising from the doing of one of those acts." *Id.* at 114. Notwithstanding a few appellate decisions to the contrary—all but one of them from a single appellate district—the overwhelming majority of Florida decisions construes §48.193(1)(g) to mean precisely what it says.

Moreover, we respectfully submit that Mr. Rudzewicz is now estopped to take a contrary position. As the circuit court held in its opinion (A. 6-7): "Although Rudzewicz concedes that his activities fall within the reach of the Florida long-arm statute, Fla. Stat. §48.193(1)(g), he argues that invocation of that statute under these circumstances exceeds the bounds of due process." Before the circuit court, Mr. Rudzewicz argued *not* that the statute should be construed to avoid the perceived constitutional infirmity, but that "invocation of that statute" was im-

permissible *despite* the fact "that his activities fall within [its] reach . . . ." Having made that concession below, Mr. Rudzewicz is now estopped to take a contrary position before this Court.[5]

3. Regarding the jurisdictional facts of this case, Mr. Rudzewicz argues (motion at 5) that the record is "void" of any proof that the franchisees in this case in fact made rent payments to Burger King in Miami. But Mr. Rudzewicz conceded precisely the opposite in his brief before the circuit court (p. 6): "The Lease/Sublease Agreement (not the Franchise Agreement) does require that all rent is to be mailed to a post office box, at a general mail facility, in Miami, Florida (EX. 9, ¶ 14.2; Tr. 85). Franchisees made but only one or two of their rent payments for Store #775." Under the authority cited in footnote 5, *supra*, Mr. Rudzewicz is now estopped to claim otherwise. Moreover, Mr. Rudzewicz' belated assertion is flatly incorrect. Burger King offered direct evidence that the franchisees did make payments to Burger King in Miami of advertising costs, real estate taxes, rent, and supply costs (Tr. 90-92). Mr. Rudzewicz' counsel responded: "We will stipulate to the accuracy of the statements" (Tr. 92); and the witness' itemized list of payments and amounts due was introduced as PX. 20 (Tr. 93).

4. Finally (motion at 17-23), Mr. Rudzewicz makes the incredible assertion that "there is no conflict among

5. *See, e.g., Hughes Masonry Co. v. Greater Clark County School Building*, 659 F.2d 836, 838-39 (7th Cir. 1981); *Douglas v. United States*, 658 F.2d 445, 449 (6th Cir. 1981); *In Re Double D Dredging Co.*, 467 F.2d 468, 469 (5th Cir. 1972); *Smith v. United States*, 466 F.2d 535 (6th Cir. 1972), *cert. denied*, 410 U.S. 912 (1973); *United States v. Webber*, 396 F.2d 381, 389 (3rd Cir. 1968). *See generally* 1B Moore's Federal Practice §0.405[8], at 238-47 (2nd ed. 1983) (and cases cited); Note, *The Doctrine of Preclusion Against Inconsistent Positions in Judicial Proceedings*, 59 Harv. L. Rev. 1132 (1946).

the circuits" (motion at 23) on the substantive question before the Court, because of four appellate decisions which appear supportive of the circuit court's reasoning in this case. These four decisions were acknowledged in our initial brief as contrary authority (p. 28 n.48), and we think it significant that Mr. Rudzewicz has been able to come up with no additional authority in support of his position.[6]

6. We did not intend by acknowledging these decisions to suggest that any of them would necessarily be *dispositive* of the instant case—but only suggestive of the circuit court's approach in this case. Obviously the facts of every case are different. For example, no less than seven times in his motion, Mr. Rudzewicz finds it appropriate to cite the decision in *Hydrokinetics, Inc. v. Alaska Mechanical, Inc.*, 700 F.2d 1026 (5th Cir. 1983), *cert. denied*, ... U.S. ....., 104 S. Ct. 2180 (1984). Admittedly, some of the facts in *Hydrokinetics* were more favorable to the exercise of jurisdiction than the facts of this case—for example, the fact that the defendant's representatives in *Hydrokinetics* had actually traveled to Texas to close the deal. But other facts are far weaker—for example, the fact that "only a single transaction is involved in this case, governed by Alaska law, which is the defendant's sole contact with the forum state [Texas]." 700 F.2d at 1029. In the instant case we have not a single transaction, but a business relationship involving ongoing payments; and we also have a contract requiring application of the forum's substantive law. That difference is significant, and thus, while we agree that the *Hydrokinetics* decision tends to support the circuit court's reasoning in this case, we by no means find it dispositive.

To this list of cases supporting the circuit court's reasoning in this case should *not* be added the decision in *Burger King Corp. v. CPM&F, Inc.*, 537 F. Supp. 651 (S.D. Fla. 1982), which Mr. Rudzewicz cites at page 11 of his motion. In that case the contract was made between Burger King's Distron division—which supplies Burger King products to franchises—and a Hawaii corporation which planned to wholesale such products to Burger King franchises in Hawaii. Because the contract in question specifically called for payments by the Hawaii corporation to be made *not* to Burger King in Florida but rather to a California address, the district court found that §48.193(1)(g) was not applicable, and thus never considered the constitutionality of that statute: "Therefore, although F.S. §48.193(1)(g) confers jurisdiction over any person who breaches a contract in this state by failing to perform acts required in this state, the Plaintiff has not shown to this Court any act which was required to be performed in Florida by the Defendant." *Id.* at 652. That case has nothing to do with this one.

We acknowledged these decisions to emphasize the unsettled nature of this question, and the importance of its resolution by this Court. In our initial brief (p. 18 n.27), we cited ten federal decisions upholding statutes analogous to the Florida statute here; and another thirteen federal decisions under facts analogous to those here, which upheld the exercise of long-arm jurisdiction under "doing business" statutes. To establish his incredible claim of unanimity among the circuits, Mr. Rudzewicz was required to deal with these cases—not with four isolated cases offered to him by the appellant in full disclosure. We think it enormously significant that in all of his motion, Mr. Rudzewicz has failed to acknowledge or address any of the cases which conflict with the circuit court's reasoning in this case.

The appellant respectfully submits that Mr. Rudzewicz has said nothing in his motion to forestall the conclusion that the circuit court in this case did declare the Florida statute unconstitutional. By its plain language, that statute clearly reaches the contract at issue in this case, and that language does not lend itself to a construction embracing a constitutional qualifier. Mr. Rudzewicz has conceded that throughout this litigation, and is estopped to take a contrary position at this stage of the proceedings. Moreover, the circuit court's decision only adds to the inter-circuit conflict on this question. There are dozens of decisions which counsel a different outcome in this case—dozens of state statutes and rules which are implicated—dozens of extant franchise relationships affected. The circuit court's opinion is far-reaching, and wrong.

CONCLUSION

For the reasons provided above, it is respectfully submitted that the appellee's Motion to Affirm Judgment should be denied, and that this Court should note probable jurisdiction of this appeal.

Respectfully submitted,

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